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SUPREME COURT, U.S.

No. 06-1703

IN THE

Supreme Court of the United States

ROBERT SHOWLER and JOHNNY DAVIDSON,
Individually and as Special Administrator of the
Estate of Kyle Adam Brinlee,

Petitioners,

v.

HARPER'S MAGAZINE FOUNDATION,
PETER TURNLEY, Individually and in his Capacity
as a Contributing Editor to Harper's Magazine,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Harper's Magazine Foundation has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

OPINION BELOW 1

REASONS FOR DENYING THE PETITION 1

STATEMENT 1

ARGUMENT 4

I. The court of appeals resolved this case on state law grounds, and no federal question is presented for review. 4

II. *National Archives and Records Admin. v. Favish* has no application to this case. 6

III. Respondents are private actors, and therefore Petitioners' citation of *Roe v. Wade* and other constitutional "right of privacy" cases has no application. 8

Contents

Page

IV. The court of appeals applied the appropriate standard of review in affirming the summary judgment granted to Respondents. 10

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Aid for Women v. Foulston, 441 F.3d 1101 (10th Cir. 2006) 9

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10

Carey v. Population Services International, 431 U.S. 678 (1977) 9

Jean v. Nelson, 472 U.S. 846 (1985) 5

Livsey v. Salt Lake County, 275 F.3d 952 (10th Cir. 2001) 9

Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1986) 10

McQueary v. Stumbo, 453 F. Supp. 2d 975 (E.D. Ky. 2006) 9

Mountain West Mines, Inc. v. Cleveland-Cliffs Iron Co., 470 F.3d 947 (10th Cir. 2006) 10

National Archives and Records Admin. v. Favish, 541 U.S. 157 (2004) 1, 6, 7, 8

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) 9

Cited Authorities

Page

Phelps-Roper v. Taft, 2007 WL 915109 (N.D. Ohio. 2007) 9

Roberts v. Wells Fargo AG Credit Corp., 990 F.2d 1169 (10th Cir. 1993) 11

Roe v. Wade, 410 U.S. 113 (1973) 1, 8, 9

State Cases

Hill v. National Collegiate Athletic Assoc., 865 P.2d 633 (Cal. 1994) 9

Federal Statutes

28 U.S.C. § 1332 4

State Statutes

21 Okla. Stat. § 839.1 3

Federal Rules

Fed. R. Civ. P. 56(c) 10

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is not reported. The opinion of the district court (Pet. App. 22a-43a) is not reported.

REASONS FOR DENYING THE PETITION

Certiorari should not be granted in this case for the following reasons:

1. the court of appeals resolved this case on state law grounds, and no federal question is presented for review;

2. *National Archives and Records Admin. v. Favish* has no application to this case;

3. Respondents are private actors, and therefore Petitioners' citation of *Roe v. Wade* and other constitutional "right of privacy" cases has no application; and

4. the court of appeals applied the appropriate standard of review in affirming the summary judgment granted to Respondents.

STATEMENT

1. Sgt. Kyle Brinlee was a soldier in the Oklahoma Army National Guard who was killed in action in Iraq. Pet. App. 3a. His death and funeral were the subjects of intense media coverage, in part, because he was the first member of the Oklahoma Army National Guard killed in action since the

Korean conflict in the early 1950s. *Id.* Petitioner Robert Shower is Sgt. Brinlee's biological father.[1] Petitioner Johnny Davidson is Sgt. Brinlee's maternal grandfather and the personal representative of his estate. *Id.*

2. A funeral service was conducted for Sgt. Brinlee in his hometown of Pryor, Oklahoma, at the Pryor High School Auditorium. Pet. App. 3a-4a. Over 1,200 people attended the funeral. *Id.* Those attending included "friends, family, admirers, classmates, military personnel, acquaintances and strangers [who] filled the Pryor High School auditorium to capacity". *Id.* at 23a. At Petitioner Showler's request, Oklahoma Governor Brad Henry attended and spoke at the service. *Id.* at 4a. At the end of the service, Sgt. Brinlee's casket was moved to the back of the auditorium, in front of the main exit, and was opened for viewing by attendees as they left the auditorium. *Id.* Sgt. Brinlee's family made the decision to open the casket at the funeral, at least in part, because his "body looked fine." *Id.* at 3a. Governor Henry and hundreds of others at the funeral passed by the open casket before they exited the auditorium. *Id.* at 4a.

3. Respondent Peter Turnley is a veteran international photojournalist who, in 2004, was working on assignment for Respondent Harper's Magazine. Pet. App. 4a. At the time of Sgt. Brinlee's funeral, Turnley was working on a photo essay for Harper's concerning those grieving over deaths caused by the war in Iraq. *Id.* Turnley contacted the funeral home handling Sgt. Brinlee's funeral arrangements and asked whether the press would be allowed to attend the funeral. *Id.* Turnley was informed the press was allowed to attend, and

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1. Sgt. Brinlee was adopted by Robert Brinlee, at which time Showler's parental rights were terminated. Pet. App. 3a.

that there would be a section in the auditorium designated for the press. *Id.* Turnley, along with other members of the news media, attended the funeral. *Id.* Turnley, along with other photographers in the press section, took photographs during the funeral service. *Id.* The photographs Turnley took that day included the published photograph at issue in this case of Sgt. Brinlee's casket while it was open in the back of the auditorium, at a location immediately adjacent to the area set aside by the family for the press. *Id.* As Petitioners concede, Turnley denies he was ever told not to take pictures of the open casket.

4. A photograph of the open casket taken by Turnley, along with 19 other photographs taken by Turnley dealing with the mourning for Americans and Iraqis killed in the war, was published in the August 2004 edition of Harper's. Pet. App. 5a. The photo essay was titled: "The Bereaved, Mourning the Dead, in America and Iraq." *Id.;* Resp. App. 1a-8a.

5. In their Second Amended Complaint, Petitioners asserted seven state tort theories of recovery based upon the open casket photograph published in Harper's. Pet. App. 5a, 44a. The state tort theories of recovery asserted by Petitioners were: (1) intentional infliction of emotional distress, (2) invasion of privacy, (3) violation of 21 Okla. Stat. § 839.1 (appropriation of another's name or likeness for commercial purposes), (4) fraudulent/false misrepresentation, (5) constructive fraud, (6) unjust enrichment, and (7) negligent hiring, retention, and supervision. *Id.* at 5a, 49a, 51a, 53a, 55a, 57a, 59a, and 60a.

6. Respondents moved for summary judgment in the district court on each of Petitioners' claims for relief.

Pet. App. 81a-123a. The district court held there were no disputed issues of fact material to Petitioners' claims, and therefore summary judgment on each of Petitioners' claims was proper under Oklahoma law. Pet. App. 22a-43a. The district court further held that the First Amendment protected the publication of the photograph of the open casket because the photograph was taken at an event Petitioners opened to the public and press; the photograph depicted truthful, newsworthy information about a matter of public interest; and the photograph documented the same scene witnessed by those in attendance at the funeral. *Id.* at 25a-30a.

7. The court of appeals affirmed the district court's grant of summary judgment. Pet. App. 1a-21a. The court of appeals held that summary judgment was proper for each of the seven state law claims for relief asserted by Petitioners. *Id.* Because it affirmed the summary judgment on state law grounds, the court of appeals did not address Respondents' First Amendment defense. *Id.* at 20a.

ARGUMENT

I. The court of appeals resolved this case on state law grounds, and no federal question is presented for review.

Petitioners' Second Amended Complaint set forth seven state law claims for relief. Pet. App. 44a-64a. Petitioners invoked the jurisdiction of the federal court on the basis of diversity of citizenship under 28 U.S.C. § 1332. *Id.* at 45a. Respondents denied each of Petitioners' claims, and raised the affirmative defense that the publication of the photograph was protected by the First Amendment. Pet. App. 65a-80a.

Based upon the undisputed evidence, the district court resolved each of the seven state claims for relief against Petitioners by way of summary judgment. The court of appeals affirmed the district court on each of these state law claims, and did not reach the sole federal question in the case – Respondents' defense that the First Amendment protected the publication of the photograph. In this regard, the court of appeals stated:

> Because we conclude that summary judgment was appropriate on each of the Oklahoma state tort claims asserted by Plaintiffs in this action, we need not address the First Amendment defense asserted by Defendants in this appeal, nor do we make any statement as to the merits of that defense.

Pet. App. 20a. The court of appeals properly resolved the case on state law grounds prior to and without reaching any constitutional issues. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985).

As a result, certiorari review by this Court would necessarily involve determining whether the court of appeals properly applied Oklahoma state law. Such a quest for certiorari relief is outside the ambit of Rule 10 considerations governing review on certiorari. This Court should not exercise its judicial discretion to review a decision of the court of appeals when that decision turns solely on the application of state law.

II. *National Archives and Records Admin. v. Favish* has no application to this case.

Petitioners attempt to suggest a federal question for this Court to consider by citing *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). *Dicta* from *Favish* was cited by Petitioners in the courts below in an attempt to support their state law claim of invasion of privacy. *See, e.g.*, Pet. App. 141a (Petitioners' response to motion for summary judgment); Pet. App. 213a (Petitioners' opening brief in the court of appeals). Both the district court and the court of appeals properly concluded that *Favish* was inapplicable to the analysis of whether Petitioners' state claim for invasion of privacy could survive summary judgment.

In *Favish*, a private citizen brought a Freedom of Information Act (FOIA) request seeking to compel the production by the federal Office of Independent Counsel of death scene photographs taken by the United States Park Police of Vince Foster, Deputy Counsel to President Clinton, who was found dead of an apparent suicide. *Favish* turned on this Court's interpretation of the language of Exemption 7(C) of FOIA, specifically whether the production of " 'records or information compiled for law enforcement purposes' . . . 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.' " *Favish*, 541 U.S. at 160 (quoting 5 U.S.C. § 522(b)(7)(C)). This Court held that "FOIA recognizes surviving family member's right to personal privacy with respect to their close relative's death scene images," and that *under FOIA* disclosure should only be denied "where the information 'could reasonably be expected to constitute an unwarranted invasion of the family's personal privacy.' " *Id.* at 170-1. Ultimately, this Court defined a balancing test between the competing interests of

personal privacy and openness of information of federal records contemplated by FOIA. *Id.* at 172-4.

The court of appeals properly held that *Favish* is inapplicable in this case because *Favish* involved a statutory privacy right under FOIA, not a state law cause of action for invasion of privacy. As the court of appeals noted, this Court observed in *Favish* that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution," citing *Favish*, 541 U.S. at 170 (which, in turn, cited *Department of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 762 (1989)). Pet. App. 10a. This Court in *Reporters Committee* stated that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." *Reporters Committee*, 489 U.S. at 763 n.13.

Further, the court of appeals properly distinguished the *dicta* contained in *Favish* upon which Petitioners rely concerning the cultural history of burial rights of the deceased and surviving family members. The court of appeals properly noted that all of the cases cited by this Court in support of its acknowledgment that the common law has recognized a family's right to control the death images of the deceased involved death images that are gruesome, and none involved images displayed voluntarily at a public funeral. Pet. App. 11a (citing *Favish*, 541 U.S. at 168-9). Petitioners' decision to have a public funeral at the Pryor High School Auditorium, in which over 1,200 people attended and Governor Henry spoke, and their decision to open Sgt. Brinlee's casket for the public to view, at least in part because Sgt. Brinlee's body looked "just fine," is a far cry from the cases involving

gruesome death images that a family does not voluntarily choose to put on public display. As the court of appeals stated,

> [t]he photographs here are not death scene photographs, but images of Sgt. Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral to pay their respects. Coupled with the public nature of this funeral, the photographs are distinguishable from those at issue in *Favish*.

Pet. App. 11a-12a. Further, both the district court and the court of appeals agreed that the Petitioners ". . . opened up the funeral scene to the public eye and can not, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo." *Id.* at 15a.

Because FOIA is not implicated here, *Favish* has no application. Further, the *dicta* contained in *Favish* upon which Petitioners rely has no application to the elements of the invasion of privacy claim brought by Petitioners under Oklahoma state law.

III. Respondents are private actors, and therefore Petitioners' citation of *Roe v. Wade* and other constitutional "right of privacy" cases has no application.

Petitioners further attempt to find a federal question for this Court to consider by citing *Roe v. Wade*, 410 U.S. 113 (1973), and other decisions of this Court for the proposition that "[t]his Court 'has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.' " Pet. 8 (quoting *Roe v.*

Wade, 410 U.S. at 152). A fundamental flaw in Petitioners' analysis is that the right of privacy articulated by *Roe* and the other cases relied upon by Petitioners is rooted in the United States Constitution, and is articulated in response to offending *state* action. Indeed, each of the cases relied upon by Petitioners concerns the constitutionality of a state statute or the conduct of a state actor.[2]

"As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.' " *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)). Petitioners' claims in this case are against purely private actors and involve purely private conduct. Consequently, a constitutional right of privacy suggested by Petitioners is inapplicable in this case.

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2. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (constitutionality of Texas criminal abortion statute); *Carey v. Population Services International*, 431 U.S. 678 (1977) (constitutionality of New York statute concerning distribution of contraceptives); *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006) (constitutionality of Kansas statute requiring professionals to notify state of suspected injury to minor resulting from sexual abuse); *Livsey v. Salt Lake County*, 275 F.3d 952 (10th Cir. 2001) (action against county and county police officer); *Hill v. National Collegiate Athletic Assoc.*, 865 P.2d 633 (Cal. 1994) (action challenging intercollegiate athletic association's drug testing program as violative of the privacy initiative of the California state constitution); *Phelps-Roper v. Taft*, 2007 WL 915109 (N.D. Ohio. 2007) (constitutionality of Ohio's statute regarding picketing or protesting during funeral services); *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006) (constitutionality of Kentucky statute prohibiting picketing and protesting at funerals).

IV. The court of appeals applied the appropriate standard of review in affirming the summary judgment granted to Respondents.

Petitioners also argue that the court of appeals failed to apply the proper standard of review in affirming the summary judgment granted to Respondents. This argument does not have merit.

First, the court of appeals properly reviewed the grant of summary judgment *de novo*, applying the same legal standard as the district court. Pet. App. 6a. *See Mountain West Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 470 F.3d 947, 950 (10th Cir. 2006).

Second, the court of appeals properly stated that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," citing Fed. R. Civ. P. 56(c) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Third, the court of appeals properly recognized that when reviewing the underlying facts of the case, "all inferences must be viewed in the light most favorable to the non-moving party and that it may not make credibility determinations or weigh the evidence," citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

Thus, the court of appeals analyzed the district court's grant of summary judgment under the appropriate standard of review and rules of law.

What Petitioners really contend is that the court of appeals misapplied Oklahoma state law with respect to their claims for invasion of privacy and fraud. However, as noted in Rule 10 of this Court's rules, a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. In any event, the court of appeals did not misapply Oklahoma law and Petitioners offer nothing to indicate that it did.

First, with respect to invasion of privacy, the court of appeals properly noted that Petitioners asserted three of the four branches of the state tort of invasion of privacy: (1) appropriation, (2) publication of private facts, and (3) intrusion upon seclusion. Pet. App. 10a. Tellingly, Petitioners wholly fail in their petition to state the elements of each of the state privacy torts considered by the court of appeals. The court of appeals carefully and methodically addressed each of the elements of each of the state privacy torts, Pet. App. 10a-17a, and Petitioners do not claim that the court misstated Oklahoma state law.

Second, with respect to fraud, the court of appeals properly set forth the elements of fraud under Oklahoma law, the same elements set forth by Petitioners in their petition. Compare Pet. App. 17a with Pet. 25. Oklahoma law further requires that when a false representation is the basis of fraud, that representation must relate to existing facts or previously existing facts, and not to promises of future acts. *Roberts v. Wells Fargo AG Credit Corp.*, 990 F.2d 1169, 1172 (10th Cir. 1993). An exception to this rule exists where a promise to act in the future is made with the intention not to perform and with the intent to deceive. *Id.* Petitioners claim Turnley told the funeral home director he would not take pictures of

the open casket, and therefore they are attempting to come within the exception. However, as the court of appeals correctly held, there was *no* evidence presented by Petitioners of Turnley's intent at the time he spoke with the funeral home director prior to the funeral. Therefore, Petitioners could not bring themselves within the exception and summary judgment was proper.

Further, Petitioners' argument that Turnley's intent may be proved by circumstantial evidence was never raised by Petitioners in the courts below. *See* Pet. App. 155a-158a (Petitioners' response to motion for summary judgment addressing fraud claim, which focused on reliance by Petitioners on the alleged promise made by Turnley to the funeral home representative); Pet. App. 210a-213a (Petitioners' opening brief in court of appeals, which focused on agency and whether Petitioners could rely on a promise made to their agent). Arguments not raised in the trial court or the court of appeals cannot be raised for the first time in a petition for writ of certiorari to this Court.

The court of appeals applied the appropriate standard of review, applied the proper state rules of law, and correctly affirmed the district court's grant of summary judgment to Respondents.

CONCLUSION

Because the court of appeals resolved this case on state law grounds alone and no federal question is presented for review, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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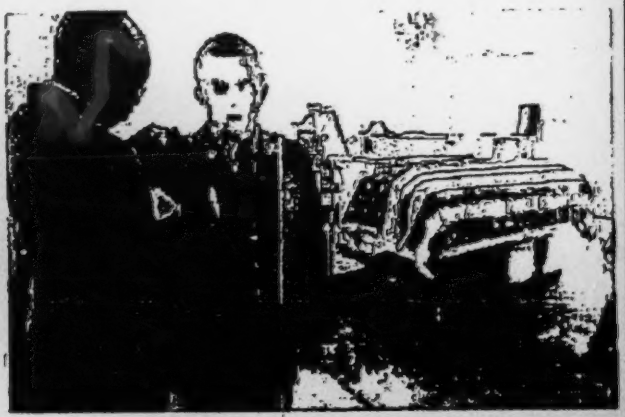
THE BEREAVED

Mourning the dead, in America and Iraq

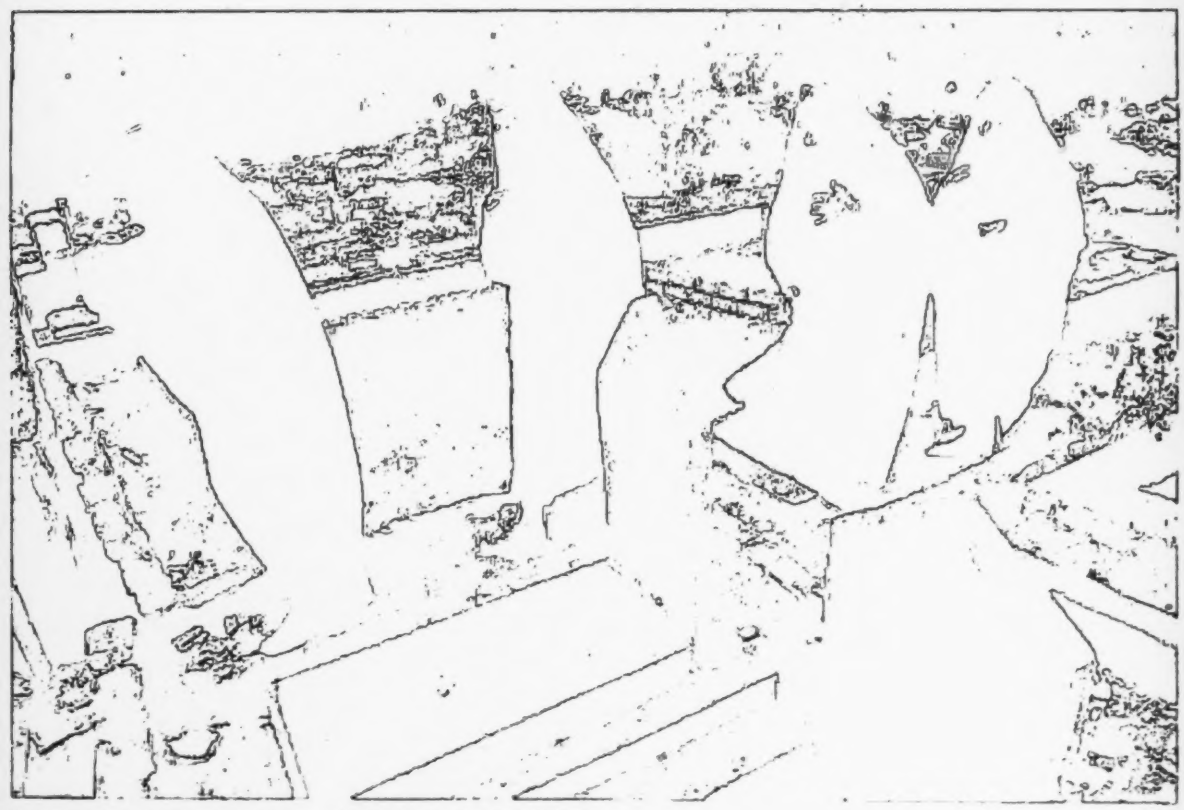
By Peter Turnley



The body of Iraqi soldier Samih-Safeq, twenty, is exhumed for proper burial, Baghdad, April 14, 2003.
Members of a military honor guard prepare for the funeral of Army Staff Sgt. Esau G. Patterson Jr., twenty-five, killed in Baghdad by a car bomb on April 29, 2004.
Relatives of Saddam Mohammed Haidar, twenty-nine, carry his body through the outskirts of Baghdad, May 13, 2003.
The parents of Staff Sgt. Patterson at his funeral in Ridgeland, S.C., May 10, 2004.

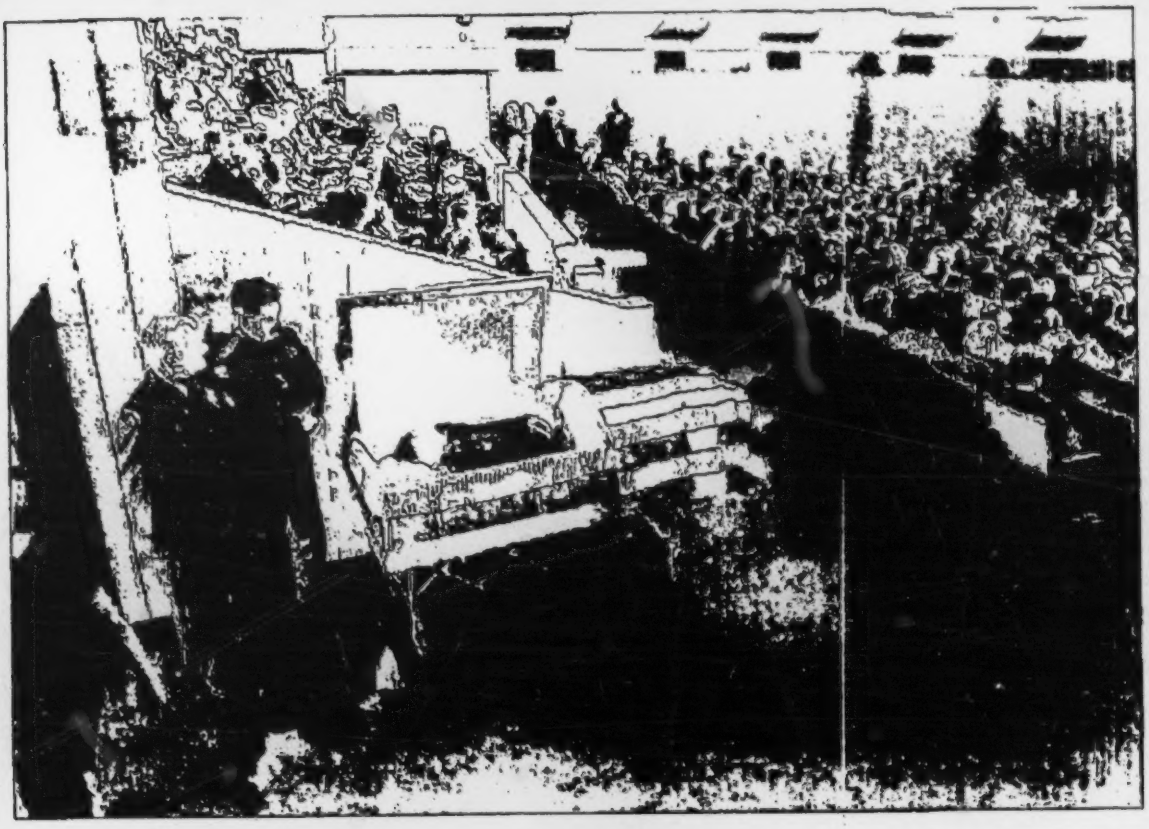
Harper's Magazine contributing editor Peter Turnley is a photographer based in Paris and New York City. He has published four books of photographs, including Moments of Revolution, Parisians, *and* In Times of War and Peace.

The funeral of Staff Sgt. Patterson.
Funeral services in Pryor, Okla., for Army Spc. Kyle A. Brinlee, twenty-one, killed when his convoy struck an improvised explosive device in Al-Asad, Iraq, on May 11, 2004.

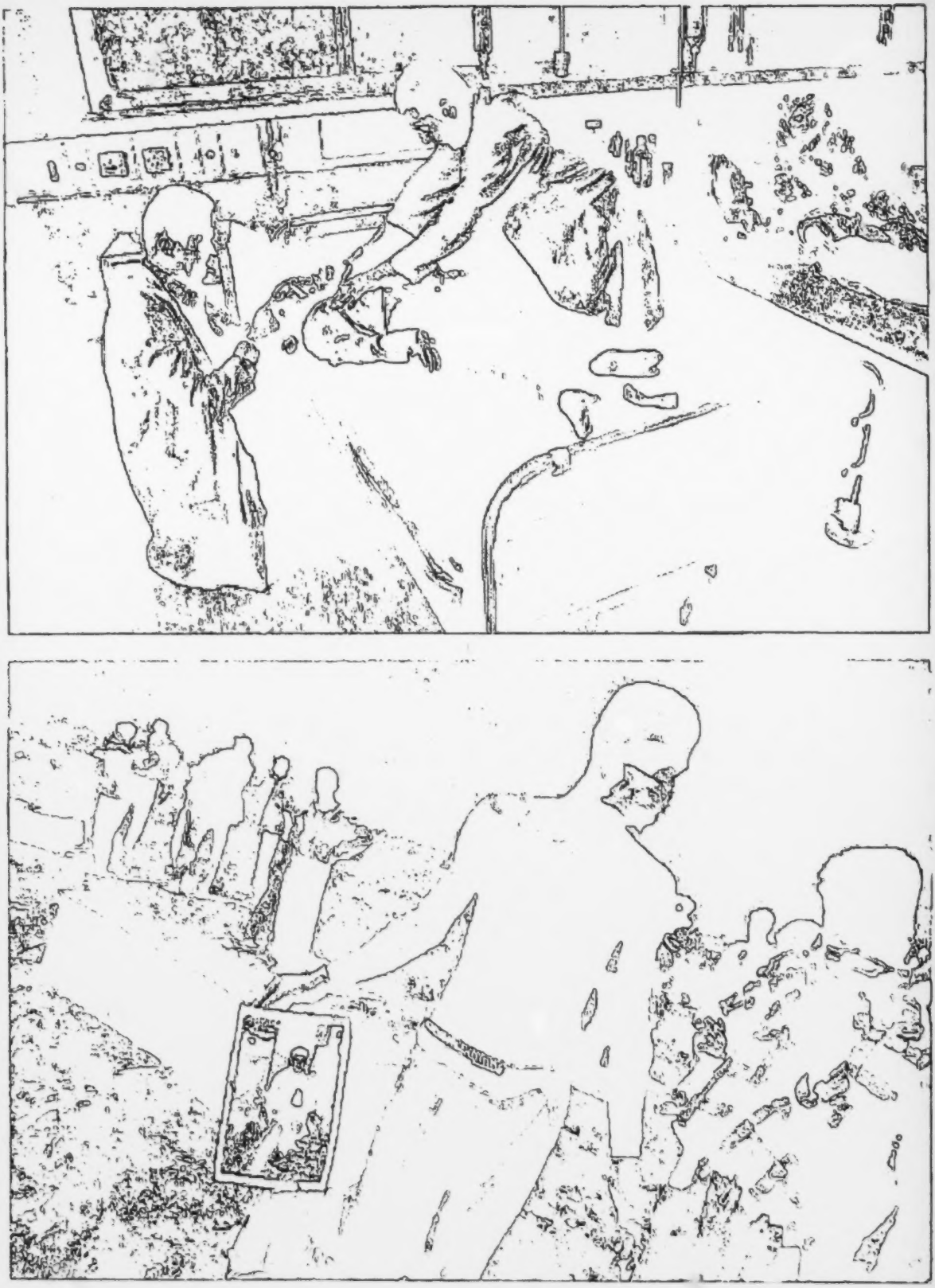


Iraqis pass by a corpse on a side street in Baghdad, April 13, 2003.
At the burial of Abedal Hassn, fifty-three. Baghdad, April 15, 2003.

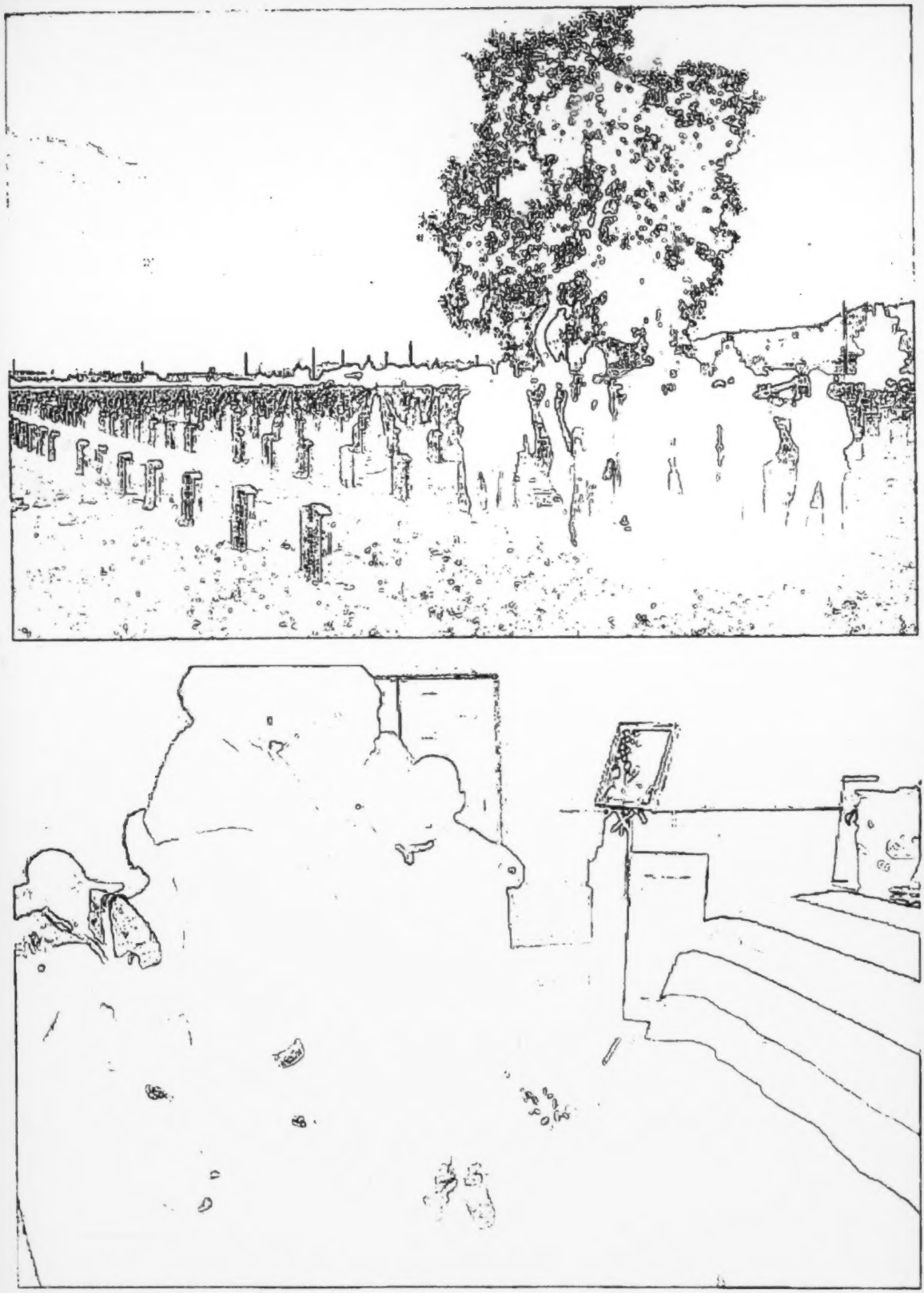
Bodies of Iraqi fighters at a hospital morgue, Basra, April 8, 2003.
A relative at the wake for Staff Sgt. Patterson.



The casket of Spc. Brinlee at funeral services in a high school auditorium in Pryor, Okla.
At the grave of Abedal Hassn, Baghdad.



Doctors are unable to save Worood Nasiaf, ten, Baghdad, April 14, 2003.
Friends and relatives bury an Iraqi soldier killed on the outskirts of Baghdad, May 14, 2003.



Family members at the El Paso, Tex., funeral of Army Spc. Isela Rubalcava, twenty-five, killed in Mosul, Iraq, on May 8, 2004. Relatives at the wake for Staff Sgt. Patterson.

Friends and relatives arrive to claim the body of an Iraqi fighter, Basra, April 3, 2003 (top left).
Outside the funeral services for Spc. Brinlee (top right, bottom left).
Grieving family members prepare to bury a relative killed in the war, Baghdad, April 15, 2003 (bottom right).